No. 214

Brief of Calderon Carlisle & Johnson for Appellees

Filed Nov 5, 1897

IN THE

Supreme Court of the United States

OCTOBER TERM, 1897.

No. 214.

FANNIE P. WILLIAMS ET AL., APPELLANTS,

vs.

JOHN W. PAINE ET AL., APPELLEES.

On Appeal from the Court of Appeals of the District of Columbia.

BRIEF FOR APPELLEES.

CALDERON CARLISLE,
WM. G. JOHNSON,
Counsel for Appellees.

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BRIEF FOR APPELLEES.

This cause comes up on appeal from the Court of Appeals of the District of Columbia from a decree dismissing appellants' bill (Rec., pp. 54, 87).

The bill (Rec., pp. 1, 16), though designated a bill for partition is in reality an attempt by parties out of possession to recover an undivided interest in a square of ground in the city of Washington which was long since sold by their ancestor who received and used, presumably for the benefit of these very complainants, the price of the property in question (Rec., pp. 36, 44).

Though the grounds on which the complainants base this alleged right are purely legal and technical, they have abandoned three ejectment suits against one of these defendants (Rec., pp. 28, 49), and have come into equity without any shadow of equitable right or title in their own favor, and without any suggestion of anything inequitable in the conduct of the defendants or those under whom they claim.

STATEMENT.

It is difficult to state the facts of the case more concisely or in a more interesting manner than that in which they are set forth by Mr. Chief Justice Alvey, speaking for the Court of Appeals, and his statement is therefore adopted with the addition of references to the pages of the record in this court to meet its rules.

> "The bill in this case was filed on the 10th of February, 1893, by the appellants against the appellees (Rec., p. 1). The bill, as amended, is framed with several aspects, and seeks to obtain relief in respect to several matters, and in various forms (Rec., p. 16). The plaintiffs allege themselves to be entitled in fee, as heirs at law of Mrs. Mary Ransom, deceased, to one undivided sixth part of square No. 53, located in the city of Washington, District of Columbia, as tenants in common with the defendants, who own the other five-sixths of said square (Rec., pp. 2, 16, 17). Mrs. Ransom, under whom the plaintiffs claim, was the wife of General Robert Ransom, and died intestate, in North Carolina, February 7, 1881, her husband surviving her, but who has since died, and before the filing the bill in this case (Rec., pp. 13, 17, 20).
>
> "It appears from the allegations of the bill and the proof, that Mary Huntt, one of the three children left by Dr. Henry Huntt, who had died intestate (Rep., p. 16), intermarried with Robert Ransom, Jr. (Rec., pp. 20, 35); and the three children, namely, Mary Huntt, afterwards Mary Ransom, Fannie Huntt, who intermarried with George Gibson, and George Gibson Huntt, inherited as heirs at law of their father Dr. Henry Huntt, the one moiety or half of said square No. 53, and of certain other parcels of ground in the city of Washington—the same having been previously acquired and held in equal moieties or halves, as tenants in common, by the said Dr. Henry Huntt and the late Benjamin Ogle Tayloe (Rec., pp. 16, 18): That being so seized and possessed, after their marriage, Mary Ransom and her husband, Robert Ransom, then an officer in the Army of the

United States, and stationed at Carlisle, in the State of Pennsylvania (Rec., p. 35), by their joint power of attorney, executed and acknowledged on the 23d of May, 1859, to George Gibson Huntt, the co-owner and brother of Mrs. Ransom (Rec., pp. 17, 43), authorized and empowered the said George Gibson Huntt to control, manage, bargain and sell, and in that event to convey, etc., all their rights, title, and interest in said property (Rec., p. 21). George Gibson Huntt was also an officer in the Army (Rec., pp. 20, 35). About two years from the date of the power of attorney, the Civil War broke out between the States, and Robert Ransom resigned his commission in the Army of the United States, and accepted a commission in the Confederate States Army, and afterwards attained the high rank of Major General in that Army (Rec., p. 14); and during the war his wife, the mother of the plaintiffs, remained in the South, within the Confederate lines (Rec., p. 39). In the summer of 1864, and during the continuance of the war, Walter S. Cox, Esq., then a practicing attorney here in the city of Washington, a relative of the heirs of Dr. Huntt, and now one of the Associate Justices of the Supreme Court of the District of Columbia, was solicited, especially by Mrs. Gibson to effect a sale of the interest of the Huntt heirs in the property mentioned and referred to in the power of attorney, including square No. 53, held as tenants in common as before stated (Rec., pp. 43, 44, 45). Accordingly, Mr. Cox, through a real estate broker, did effect a sale of all the interest of all the parties claiming as heirs of Dr. Huntt, in the property so held as tenants in common, and which sale was made to Benjamin Ogle Tayloe, the co-tenant, at and for the sum of $2,500 (Rec., pp. 44, 46). Thereupon Mr. Cox rendered a statement to Mrs. Gibson, one of the parties in interest and a sister of Mrs. Ransom, as follows:

"Amount of purchase	$2,500.00
"Payment of taxes by Mr. Tayloe, amounting to	199.27
"Leaving balance of	$2,300.73

(Rec., p. 51), to be divided into three parts, making the dividend to each of the three heirs the sum of $766.91 (Rec., p. 51). The whole amount of the purchase money, less the taxes deducted, was paid by Mr. Tayloe to Mr. Cox, and the latter paid over the same to Mrs. Gibson; and the share of Mrs. Ransom was paid over to her, Mrs. Ransom, by her sister, Mrs. Gibson (Rec., pp. 46, 47). And on the 29th of November, 1864, George Gibson Huntt, by virtue of the power of attorney from Ransom and wife, before referred to, reciting the sale and payment of the purchase money made and executed the deed to Tayloe, set forth in the record (Rec., p. 23). Both the power of attorney and this deed to Tayloe were admitted to record together on the 14th of January, 1865, (Rec., pp. 21, 23).

"It also appears, both from allegations and proof, that Benjamin Ogle Tayloe died testate in 1868, leaving several children, among them a daughter, Julia Dickinson Tayloe, who had previously married John W. Paine, one of the defendants (Rec., pp. 24, 25); and that the testator by his will, and codicil thereto, devised his real estate, including square No. 53, to his three daughters in fee simple, as tenants in common (Rec., p. 68). That afterwards, by deeds of partition, dated November 7, 1870, the real estate so devised in common was divided, and the devisees took their respective shares in severalty, and in this partition square No. 53 was allotted and conveyed to Mrs. Paine (Rec., p. 69). Mrs. Paine died intestate in February, 1872, leaving surviving her her husband, John W. Paine, and as her only heirs at law three infant children, defendants in this case (Rec., p. 24). The property was vacant and wholly unimproved (Rec., p. 29); and some time before the purchase of the interest of the Huntt heirs, as above stated, their interest in the property had been sold for taxes due the corporation of the city of Washington, and Tayloe had become the purchaser and taken a deed therefor (Rec., p. 68); and from that time forward he continued to pay all taxes and public dues thereon; and from the time of the partition of the real estate among the three daughters of the testator, John W.

Paine, one of the defendants, continued to pay the taxes thereon, and to exercise exclusive ownership over the same, in right of his wife, and for himself and his children (Rec., pp. 25, 26); and subsequently, at a cost of about $125,000, he erected twenty-two stone and brick dwelling houses on the square, from which he has been in receipt of the rents (Rec., p. 27).

"The bill, alleging the facts to which we have referred, and others less material, prays for the following relief (Rec., pp. 3, 18).

"1st. That the deed or instrument purporting to be made by George Gibson Huntt, by virtue of the power of attorney made to him by Ransom and wife, be declared null and void, as a cloud upon the title of the plaintiffs:

"2d. That the right of the plaintiffs to a one-sixth part or interest in fee as tenants in common in said square No. 53 be established against all the said defendants by decree, as well the tenant for life, as the reversioners, heirs at law of Mrs. Paine, deceased:

"3d. That plaintiffs may have the said one-sixth part of square No. 53 set off to them in one undivided interest, if that be found practicable, and if not, that a sale of said square may be had under the direction of the court, and a distribution of the proceeds according to the interests of the parties entitled:

"4th. That John W. Paine, the surviving husband of Mrs. Paine, and one of the defendants, be required, under the direction of the court, to account to the plaintiffs for the rents and profits received by him from the said one-sixth part of said square No. 53, and that accounts thereof be taken; and,

"5th. That the plaintiffs may have all such further and other relief as the nature of the case may require.

"All grounds of relief as set forth in the bill are controverted by the answer of John W. Paine, the tenant for life (Rec., p. 6); and the other defendants, by their answer, say that they are not in possession of said square, and have never been in possession of it; and that the property in controversy descended to them upon the death of their mother, subject to

> an estate for life by the courtesy vested in their father (Rec., p. 11); and that they have no manner of interest or concern with the account of rents and profits prayed against the life tenant, and they therefore object to the bill as being multifarious (Rec., p. 11). With respect to most of the facts alleged, they say they have no personal knowledge, and they therefore demand proof thereof."

There were some other matters of fact alluded to in the body of the opinion of the Court of Appeals which are sufficiently covered by what follows in the statement of this brief.

The matter of the ejectment suits instituted and abandoned by appellants, is, however, not mentioned by the Court of Appeals, though Mr. Justice Hagner in his opinion says (Rec., p. 66):

> "The plaintiffs previously seemed to recognize the necessity of bringing suit at law for the relief they now seek, and accordingly instituted the three ejectment suits given in evidence, in which they expressly aver the possession of the defendant John W. Paine and their own ejectment by him."

The history of these suits is as follows:

On the fourteenth day of August, 1889, Robert Ransom, Jr., the father of the complainants herein, filed his suit in ejectment, No. 29,908 of the dockets of the Supreme Court of the District of Columbia, against all the defendants herein, seeking thereby to recover an undivided one-sixth of square fifty-three from the said defendants, in which he, the plaintiff, claimed a life estate as tenant by the courtesy in right of his wife, Mary Ransom, born Huntt. This action was, on the twentieth day of April, 1891, discontinued by the plaintiffs' attorney (Rec., p. 49, 18).

On the same day these complainants filed their suit in ejectment in the Supreme Court of the District of Columbia against the defendant John W. Paine, the same being

No. 31,641 of the dockets of said court, in which they sought to recover the possession of an undivided one-sixth of said square, to which they claimed to be entitled in fee as tenants in common, but on the sixteenth day of April, 1892, this action was discontinued by the plaintiffs' attorney (Rec., p. 49, 28).

On the same day the complainants instituted another action of ejectment against the defendant John W. Paine, the same being numbered 32,845 of the dockets of the said Supreme Court of the District of Columbia, whereby they sought to recover an undivided one-sixth of said square, to which they claimed to be entitled in fee as tenants in common (Rec., 49, 28).

On the tenth day of February, 1893, while the ejectment suit was still pending, this bill was filed, and the next day, the eleventh, this last action of ejectment was discontinued by the plaintiffs' attorney (Rec., pp. 1, 10).

It is to be observed that it is nowhere claimed by the complainants that there was any fraud in the procuring of the power of attorney, nor is it denied that it was the intention and purpose of Mrs. Ransom and her husband to give to her brother full power and authority to dispose of her interest in this property. It is nowhere denied that he undertook to execute that power; that the consideration was actually paid by Benjamin Ogle Tayloe, nor is it anywhere denied that the consideration was received by Mrs. Ransom. Though there is no charge of fraud, nor denial of the facts above stated in the complainants' bill, and no evidence was offered by the complainants on the subject, the defendants, notwithstanding the lapse of more than thirty years since the transaction was consummated, have, by extraordinary diligence, shown by uncontradicted testimony of the highest credibility that the power of attorney was executed freely by Mrs. Ransom; that it was her intention and pur-

pose to enable her brother to dispose of the property; that it was her desire and that of her husband to have it disposed of (Rec., p. 39); that all parties connected with the transaction acted in perfect good faith; that the money was paid by Tayloe to Judge Cox, and was the full value of the property at the time of the sale, and that the money so paid by Tayloe was actually received by Mrs. Ransom (Rec., pp. 36, 37, 46, 74).

Under these circumstances it cannot be pretended that the complainants have the shadow of a moral right to set up a claim to this property. No such claim was ever made by their mother in her lifetime, nor by their father in their mother's lifetime, nor by any one until more than eight years after Mrs. Ransom's death, and more than thirty years after the date of the power of attorney, and after the property had been handsomely and expensively improved.

It is also shown in the testimony that Mrs. Gibson, Mrs. Ransom's sister, and Colonel George Gibson Huntt, her brother, to whom the power of attorney was given, at the same time and in the same transaction, sold to Tayloe their interest in the property and for the same price, the total sum being twenty-five hundred dollars, one-third of which was the share of each (Rec., pp. 45, 46).

The sole ground of complainants' demand is that the power of attorney was not such an instrument as was technically sufficient in law to pass the interest of Mrs. Ransom to Benjamin Ogle Tayloe, and their position in this court is that, notwithstanding the fact that their mother and father authorized her brother to sell her interest, and accepted the purchase price from the purchaser of the property, yet because she did not, as in equity and good conscience she was bound to do, give to the purchaser a technically valid conveyance of the property, these complainants, standing in her place, have the right, not only to refuse to do what their mother ought to have done if the power of attorney was ineffectual, but have the right now to repudiate her moral

and equitable responsibilities in the premises, and to claim back the property for which their mother received the purchase price, and of which they are presumed to have had the benefit, as it appears that the object of the sale was the benefit of the Ransom family (9 Rec., p. 39); and that the money was used for the benefit of that family while these complainants were yet dependent children.

The defendants were all resident without the District of Columbia, and jurisdiction was sought to be acquired over them by publication in lieu of personal service of process. A special appearance was entered and motion made to quash the order of publication, which was overruled (Rec., p. 70). Thereafter the defendants, not waiving their objection to the jurisdiction of the court, but still insisting upon it, demurred to the bill (Rec., p. 4), and upon the demurrer being overruled (Rec., p. 5), still denying the jurisdiction of the court, and still insisting upon that objection and the objections raised by the demurrer, under compulsion, answered the bill (Rec., p. 6). The cause then came on for hearing on the merits, on the pleadings and evidence, and a decree was entered dismissing the bill (Rec., p. 54), from which complainants appealed to the Court of Appeals of the District of Columbia (Rec., p. 54). That court affirmed the decree of the court below and the complainants have appealed to this court (Rec., p. 89).

ARGUMENT.

I.

As to the Jurisdiction in Equity of the Cause by Reason of the Subject-Matter.

It is claimed by appellants' counsel that the order of the court overruling defendants' demurrer (Rec., pp. 4, 5), founded

upon the objection that the complainants were out of possession, and therefore could not maintain a bill to remove cloud from title or for partition, settled the law of this case, and that that question was not open to the consideration of the court on the final hearing. In this the complainants' counsel ignore the very important fact that under the demurrer the fact that complainants were out of possession was only to be inferred from the averments of the bill, whereas, when the cause came on for hearing on the merits that fact was affirmatively set up in the answer and unequivocally established by the evidence.

On the demurrer the question was, what did the bill show. On the final hearing the court had all the pleadings and the evidence, and the question was, what is the fact as to possession. Moreover, when a court is called upon to make a final decree or enter final judgment, it must render it according to the right of the matter, and is not bound to enter an erroneous judgment merely because at some prior stage of the proceedings a view has been taken and expressed as to the sufficiency of some pleading. The fact is that complainants were out of possession, and were kept out of it by defendants, holding adversely to them.

As far back as 1864 Benjamin Ogle Tayloe got a tax deed for the property because of the default in payment of taxes (Rec., p. 68).

It is not necessary to claim that this deed vested the legal title in Tayloe. It was not offered for that purpose. But it was evidence of a claim and color of title in Tayloe as far back as 1864.

The defendant, John W. Paine, as above shown, exercised exclusive ownership over said property in right of his wife, after Tayloe's death, by paying taxes, renting the property, and improving it by substantial and valuable dwellings (Rec., p. 25). Moreover, complainants brought ejectment suits to recover possession of the property against the defendant in possession, alleging their ouster by him (Rec., pp. 28, 49).

It is suggested by appellants in their brief that these proceedings in ejectment brought against defendants are not before this court because defendants failed to file copies thereof (Appellants' Brief, p. 7).

These records were in the pleadings regularly prayed to be taken and read as part of the answer, were regularly offered in evidence, and, in accordance with the uniform practice in the Supreme Court of the District, were read at the hearing by the originals, and the opinion of Mr. Justice Hagner shows that they were "given in evidence" and considered by the court (Rec., pp. 10, 49, 66).

But if it is intended by appellants' counsel to claim that the records of these suits did not disclose what is contended, or that the court gave any undue importance to them, it would seem to be the duty of appellants who bring up the record, to copy them into the transcript.

This state of facts seems to counsel to be a sufficient vindication of the position taken by the court that the bill was not maintainable, on the ground of complainants being out of possession, but as the learned chancellor found it to be his duty to dismiss the bill upon its merits, and was sustained by the Court of Appeals, counsel do not deem it necessary to present any extended views upon that subject, but respectfully refer this court to the very clear, accurate and complete exposition of this question embraced in the opinions of Mr. Justice Hagner, and Mr. Chief Justice Alvey, found in the Record (Rec., pp. 65, 66, 76).

In view of the fact that the decisions of the courts of the different jurisdictions are not harmonious, counsel would add this single suggestion to the views expressed in the learned opinions just mentioned, namely, that this is a question of local practice and procedure, and the decisions in the District of Columbia have uniformly been against the contentions of the complainants.

The statement in complainants' brief (p. 23) that the Court of Appeals of Maryland (Campbell *vs.* Lowe, 9 Md.

500, 511) held the contrary, and that showing title by one out of possession would sustain a bill for partition, is incorrect.

By reference to the facts in that case it appears that the complainant Campbell claimed an undivided moiety of the land by virtue of a sheriff's deed, and instead of being *out of possession*, the report shows he was *in possession*, having been "PUT IN POSSESSION UNDER A WRIT OF *habere facias*."

Campbell *vs.* Lowe, 9 Md. 501.

II.

The Power of Attorney and Execution Thereof by George Gibson Huntt are Valid and Passed the Legal Estate of Complainants' Mother.

Whether, at common law, a *feme covert* could give a valid power of attorney to convey her lands, is not a question presented by this record. A married woman, at common law could not herself convey, and could not do, by attorney, what she was incapable of doing as principal.

Before the invention of fines and recoveries she could not convey even with the assent of her husband; but after that she could, with his concurrence, and by a private acknowledgment designed to free her from his coercion. Later, fines and recoveries came to be unnecessary, and baron and *feme* could alien by deed instead of by record, but the husband must join and the wife privily acknowledge.

The husband and wife being capacitated to alien by deed, without the judicial proceedings of a fine or recovery, the question arises, can they, having the joint power to act, jointly empower an attorney to act for them?

Mr. Justice Story, in his work on Agency, expresses his opinion as follows:

> "Where a married woman is capable of doing an act, or of transferring property or rights with the

> assent of her husband, there, perhaps she may, with the assent of her husband, appoint an agent or attorney to do the same thing."
>
> Story on Agency, Sec. 6.

And Professor Washburn, speaking of the rule laid down in some States that a married woman, even jointly with her husband, cannot execute a valid power of attorney to make a deed of her interest in real estate, says:

> "But it is difficult to perceive any reason for the rule where she can do the principal thing herself; and such a right is clearly recognized by statute in Massachusetts; and a similar right is also recognized by statute in New York."
>
> 3 Washburn, Real Prop. 232, 233.

This view of the law was entertained by the Court of King's Bench as early as the fifth year of the reign of Charles the First, the question being whether a power of attorney of husband and wife to deliver a lease of the wife's land was valid, and Croke reports the case as follows:

> "*Ejectione firmæ.* The plaintiff declares upon a lease made by Sir Archibald Douglass and Dame Elionor his wife of an house and lands in Englefield. Upon not guilty pleaded, it appeared upon the evidence that the lease was sealed and subscribed by them both, and a *letter of attorney made by them to deliver it upon the land*; and it was thereupon strongly urged by Fynch, serjeant, and Sheldon, the King's solicitor, that a letter of attorney by *feme covert* is merely void, and the lease is only the lease of the husband; so the plaintiff hath failed. But *all the court* conceived it was a *good letter of attorney for both* and the lease well delivered, and it is the lease of them both during the husband's life."
>
> ——— *vs.* Hopkins, Croke, Charles, 165.

In Holladay *vs.* Daily, 19 Wall. 606, relied upon by complainants' counsel, the court, through Mr. Justice Field,

speaking of the general objection to a conveyance through a power of attorney by a *feme covert*, places it upon the requirement of a private acknowledgment by the wife, which must be made by her and cannot be made for her, and says (p. 609):

> "The private examination is required to protect her from the coercion or undue influence of her husband, and her acknowledgment is therefore considered as an essential preliminary to the validity of any transfer by her. The private examination is in its nature personal; it is a matter in which she cannot be represented by another."

In that case there was no acknowledgment at all to the power, while in the case at bar the acknowledgment is in every way as full. formal and sufficient as would be required for her deed.

The court further makes use of this significant language (p. 610):

> "Assuming, however, that such a statute [one authorizing a *feme covert* to convey by attorney in Colorado] does exist, or that without any such statute the authority of a married woman to convey in connection with her husband, which is conferred, implies a power to appoint an attorney for that purpose—and there are adjudged cases which proceed upon that theory—we do not see any objection to the validity of the deed executed in the name of Holladay alone, or to its operation in passing title."

So that it will be seen that this decision rather supports the opinions of Story and Washburn above quoted and the decision in Croke than the contention of complainants' counsel.

Powers of attorney by baron and *feme* to convey the lands of the wife were not unknown or unused in the early days of the Colonies. In McNayr's Conveyancing, published in Glasgow, 1789, is given a form of a letter of attorney "from husband and wife to sell a plantation, sugar-work and

negroes, and to execute the deed of conveyance" (p. 138), while in the Provincial Court of the Province of Maryland such a power of attorney appears not only to have been recognized by the court but judgment given in favor of the validity of the deed made thereunder as far back as 1738.

Elliott's Lessee *vs.* Osborn, 1 Harr. & McH. 146.

The policy in England being to recognize as valid joint powers of attorney by husband and wife to dispose of the lands of the wife as shown by the judgment in Croke, Car. *supra*, and the like being the policy in the Colonies as shown by the forms of conveyances as above referred to, and the judgment in Elliot *vs.* Osborne, the statutes of the province of Maryland of 1715 and 1766, being remedial in their nature, are to be liberally construed in line with that policy, and it is submitted that by a fair construction of those statutes, married women were authorized to execute, jointly with their husbands, valid powers of attorney for the conveyance by deed of the wife's interest in real estate.

This view is taken and learnedly treated by the court below (Rec., 78–80) by Mr. Chief Justice Alvey, who so long and ably presided over the Court of Appeals of Maryland.

> "At the common law, the conveyance of a *feme covert*, except by some matter of record, was absolutely void, and in England, until the St. 3 and 4 W. 4, Ch. 74, abolishing fines and recoveries, a *feme covert* could only pass her freehold estate, not held as her separate estate, by fine or common recovery. In Maryland, however, whose laws in force in 1801 were adopted for this District, and are still in force here, except where changed or modified by acts of Congress, the substitution of the ordinary deed of conveyance by the wife for fine or common recovery, was made by the Colonial Statutes of 1715, Ch. 47, 1752, Ch. 8, and 1766, Ch. 14; and the ceremony of private examination of the *femè covert*, and her voluntary acknowledgment of the deed, were made substi-

tutes for the private examination as to her voluntary consent in the levying of the fine or recovery.

"By the Act of 1715, Ch. 47, after declaring what nature of conveyances should be made, executed and recorded, in order to pass any freehold, or an estate for a term of more than seven years, then provides, that when the grantors or bargainors may live remote from the court or officer required to take the acknowledgment, in the county where the land was situated, such acknowledgment was authorized to be taken where the grantor or bargainor lived; and it is then further provided that '*if any such grantor or bargainor* of any lands or tenements, etc., shall happen to be out of the province, etc., at the time of the ensealing such writing, so as the same cannot be acknowledged, as is before directed, or enrolled within the time for that purpose hereinbefore limited, that *in every such case* such lands or tenements as aforesaid shall be acknowledged by *a letter of attorney*, well and sufficiently proved, etc., anything hereinbefore contained to the contrary thereof notwithstanding.' And, in a succeeding section of the same act, it is provided, 'that if any *feme covert* be named as grantor in any such writing *indented* [the indenting is dispensed with by Act of 1794, Ch. 57] the same shall not be in force to debar her or her heirs, except upon her acknowledgment of the same, and the person taking such acknowledgment shall examine her privately out of the hearing of her husband, whether she doth make her acknowledgment of the same willingly and freely, and without being induced thereto by fear or threats of, or ill usage by her husband, or fear of his displeasure.' This acknowledgment is required to be reduced to writing and certified by the judge or justice taking the same, and it is required to be recorded, and which acknowledgment so made shall bar the *feme covert* and her heirs. And so by the Act of 1766, Ch. 14, it is provided that *any person or persons* conveying land and not living within the province, so that the deed cannot be acknowledged as previously directed, then and in every such case the deed or conveyance shall be acknowledged by *letter of attorney*, well and sufficiently proved, etc.

And in a succeeding section of this last mentioned act, it is provided that any *feme covert* joining with her husband in any of the several kinds of conveyances thereinbefore mentioned, and acknowledging them upon private examination, according to the form and direction of the previous Act of 1715, where such *femes covert* have the right, title or interest of the lands, or any part thereof, intended to be conveyed, shall, by such execution, examination, acknowledgment and enrolment, be barred and foreclosed to all intents and purposes whatsoever. These provisions of the Acts of 1715 and 1766 were in force in this District in 1859, and are still in force, and they were in no respect repealed by or in conflict with the Acts of Congress of the 31st of May, 1832 (4 Stat. 520), and of the 20th of April, 1838 (5 Stat. 226), relating to the execution and acknowledgment of deeds for land in the District of Columbia. The Acts of Congress do not profess to repeal the Acts of Maryland of 1715 and 1766, or to be exclusive in their operation; but they have, in some particulars, not involved here, amplified and extended the provisions of the former statutes then in force. And construing these statutes altogether, and looking to the reason and policy upon which they are founded, it would seem to be clear that in the year 1859 and down to the year 1865, it was competent to a *feme covert*, by a joint power of attorney with her husband, duly executed and acknowledged according to the forms prescribed by the statute, to execute and acknowledge a valid deed of conveyance of her real estate situate in the District of Columbia. It is well settled that a power to convey land must possess the same requisites, and observe the same solemnities in execution and acknowledgment, as are necessary in a deed directly conveying the land; and that a title to land can only be acquired and lost according to the laws of the place where the land is situated. Clarke *vs.* Graham, 6 Wheat. 577. In this case, the property to be conveyed was specifically mentioned and described in the power of attorney; and the power of attorney was executed and acknowledged at Carlisle, in the State of Pennsylvania, by

husband and wife, under their hands and seals, and the acknowledgment and authentication of the instrument was in all respects in accordance with the provision of the statutes in force in the District of Columbia, providing the manner and form in which the real estate of *femes covert* could be conveyed. Indeed, we do not understand that the statutory requirement in respect to the form of acknowledgment and authentication thereof, is a matter of objection. The terms of the statutes, any "grantor or bargainor of any lands or tenements," being out of the province; or "any person or persons conveying," etc.; not residing in the province at the time, etc.; may acknowledge said deed by letter of attorney, well and sufficiently prooved, etc., are sufficient to embrace *femes covert*, authorized to sell and convey their real estate. If not, then the husband could not sell and convey by power of attorney, free of the contingent right of dower of his wife, for if the wife could not acknowledge by power of attorney a deed for the conveyance of her own real estate, she would be equally unable to acknowledge, by power of attorney, a deed for the relinguishment of dower in the lands of her husband. Such disability, we think, was never intended by the legislatures passing the statutes to which we have referred, to be fixed upon *femes covert*, having lands with right to convey the same."

See also Williams *vs.* Paine, 7 App. D. C. 116, 135, 138.

To deny validity to such instruments now, in a court of equity, upon no equitable ground would unsettle many ancient titles derived through such instruments.

1. The Act of March 3, 1865, cured any defect in the power of attorney.

Congress, by the act approved March 3, 1865, undertook to quiet and set at rest many questions as to the validity of titles, and it is submitted that by that act it has forever put an end to such contentions as are made by the complainants

in this case. The defendants having acquired title through the deed of partition executed in November, 1870, and recorded in December, 1870, claim under the original act (13 Statutes at Large, p. 531), which is, for the convenience of the court, printed in an appendix to this brief, and are not bound by any modifications introduced by the revision of 1874, their rights being determined by the law as it stood at the time they acquired title.

> "Rights acquired by a deed, will or contract of marriage or other contract executed according to statutes subsequently repealed subsist afterwards, as they were before, in all respects as if the statutes were still in force."
>
> Osborn *vs.* Nicholson, 13 Wall. 662.

The act of March 3, 1865, provides, *inter alia:*

> "That all deeds heretofore recorded in the land records of the District of Columbia . . . which have been executed and acknowledged by an attorney-in-fact, duly appointed for conveying real estate in said District, . . . and all deeds heretofore executed and recorded as aforesaid for the purpose of conveying land situated in said District, acknowledged by an attorney-in-fact, duly appointed, . . . who has acknowledged the same to be his act and deed instead of the act and deed of the grantor, . . . shall be and the same are hereby declared to be of the same effect and validity to pass the fee simple or other estate *intended* to be conveyed . . . in favor of parties in actual possession, claiming under and through such deeds as if such deeds had been . . . executed and acknowledged by the grantor in the deed . . . and as if such attorneys-in-fact . . . had acknowledged the deed to be the deed of the grantor.
>
> "And provided also, that when the power of attorney shall have [been] executed by a *feme covert* the same shall be effectual and sufficient if there shall have been such an acknowledgment of the same as would be sufficient under the provisions of this act to pass her estate and interest therein, were she a party executing the deed of conveyance."

The complainants' counsel contends (Brief p. 31) that the Act of March 3, 1865, could not have the effect of giving validity to this power of attorney, because it applies only to the acts of attorneys that a married woman could legally appoint as to some separate estate which she had a power to deal with as a *feme sole*, and as to which she could appoint an attorney.

As to this proposition, it is to be noticed that complainants' counsel do not explain why a statute should be passed validating powers of attorney which are already valid, and it is submitted that this act was designed not to declare good that which was clearly valid, but to declare to be effectual certain *attempted and intended* conveyances, which were either invalid or doubtful in law.

To confine the statute to valid and effective acts of parties would be to render it utterly nugatory, and to impute to the legislature imbecility of conduct and motive.

Nor is it any objection to the extension of the statute that it may embrace and render effectual acts which were void in law. In the case of Randall *vs.* Kreiger, 23 Wall. 137. a husband and wife residing in New York gave a power of attorney to one to sell and convey lands of the husband in the then Territory of Minnesota.

By the law of the territory no such power was valid, but two years after the attorney had executed the power, by a sale of the land, the legislature passed an act similar to this act, declaring all such conveyances to be as valid as if executed by the parties themselves. The husband had received the purchase money, and subsequently died leaving all his estate, consisting of personalty, to the widow, who now, after the land had advanced in value and been improved, set up a claim to dower in the land conveyed under the joint power of attorney of herself and her husband, on the ground that the same was void, and that, as is claimed here by complainants, the curative statute could not render her void act valid.

This court, in a very able and forcible opinion by Mr. Justice Swayne, sustained the act, however, declaring that the power of the legislature to "pass laws giving validity to past deeds which were before ineffectual is well settled" (p. 148), and proceeds as follows (p. 149):

> "To the objection that such laws violate vested rights of property it has been forcibly answered that there can be no vested right to do wrong. Claims contrary to justice and equity cannot be regarded as of that character. Consent to remedy the wrong is to be presumed. The only right taken away is the right dishonestly to repudiate an honest contract or conveyance to the injury of the other party. Even where no remedy could be had in the courts, the vested right is usually unattended with the slightest equity.
>
> "There is nothing in the Record persuasive to any relaxation in favor of the appellant of the legal principles which, as we have shown, apply with fatal effect to her case. The curative Act of 1857 has a strong natural equity at its root. *It did for her what she attempted to do, intended to do, and doubtless believed she had done, and for doing which her husband was fully paid.*
>
> "The purchase money for the lot became a part of his estate, and the entire estate was given to her at his death. Not satisfied with this, she seeks to fasten her dower upon the property in question.
>
> "The act accomplished what a court of equity, if called upon, would have decreed promptly as to the husband, and would have failed to decree as to the wife only from the want of power. The unbending rule of law as to *femes covert* in such case would have prevented it. *The legislature thus did what right and justice demanded, and the act strongly commends itself to the conscience and approbation of the judicial mind.*"

In view of this language of this court, it seems there can be no doubt as to the propriety of construing a curative act, and this particular act, to apply to conveyances which were invalid in law, and, indeed, such is the obvious purpose of the statute.

2. The Instrument Executed by George Gibson Huntt is Within the Relief of the Statute.

Counsel for appellees are unable to concur in the view taken by the learned Chief Justice in the court below (Rec. 84–85), that the instrument executed by George Gibson Huntt is not within the terms of the curative act of Congress of March 3, 1868.

It is to be remembered that the whole purpose of the statute is to reach informal and defective instruments, and that it is a statute which is to be liberally construed in favor of effectuating the intent of the parties, and not to be strictly construed so as to defeat that intent. It must be construed in harmony with and not against its purpose.

The language of the act addresses its curative provisions to "*all deeds for conveying any real estate or interest therein . . . to all deeds* heretofore executed *for the purpose* of conveying land," and declares that they "*shall have the same effect* to pass the fee simple or other estate *intended to be conveyed*" as if they had been free from the various enumerated defects.

It would be difficult to imagine language more adapted to these several instruments and their alleged defects than is in this act employed, as is pointed out by the learned chancellor in his opinion, (Rec , pp. 57, 58), and so applicable is the language of the statute to these instruments that he is led to say in his opinion:

> "Indeed, the marked identity of description would almost suggest that the draughtsman of the statute had these instruments before him when he was framing the law" (Rec., p. 58).

That the instrument executed by the attorney is a "deed" cannot be questioned, because it is under seal. Nor can it be denied that it was "executed and acknowledged by an attorney-in-fact duly appointed for conveying real estate situated in said district," the exact words of the statute, because

attached thereto is the power of attorney constituting him attorney-in-fact expressly to "bargain and sell, and in that event convey" (Rec. 21) this specific property.

In the deed executed by the attorney-in-fact he acknowledges the receipt of the purchase money and says he has "bargained and sold" to Tayloe the land in controversy. There is no where in the instrument the reservation of any further act to be done by the attorney to complete his act, so far as he is concerned. It would seem to be clear, therefore, that the payment of the purchase money, and the bargain and sale, passed to the purchaser all beneficial interest in and right to the property, whereupon it became, by virtue of the statute of uses, a conveyance of the land.

The subsequent covenant for a conveyance by the principals is nothing but a covenant for further assurance, and cannot, it is submitted, prevent the instrument from taking effect as a grant *in præsenti*, because it reserves no act to be done by the maker of the instrument. So far as George Gibson Huntt is concerned, he does not reserve for future exercise any power whatsoever, but covenants solely *as to his principals*, Robert and Mary Ransom, "that *they* shall and will, as soon as convenient, make and execute a proper deed of conveyance," &c. (Rec. 23). This covenant, so far from leaving anything to be done by the attorney, excludes that idea entirely, but merely covenants that the principals shall ratify and confirm the act of their agent.

This is totally different from the cases referred to in the brief of appellants (Brief, pp. 43, 44), and the opinion of the Chief Justice (Rec. p. 84, 85), where it was held not to be the *intention* of the parties to make a conveyance *in præsenti*, because in all those cases it will be found that something was reserved by the party who signed the paper acting *sui juris*, and not a covenant that some one not a party to the instrument should confirm what the party executing it had completely done.

3. Possession at the Time of the Passage of the Act Not Essential.

The appellants also contend that the act does not apply, because the defendants were not in possession on March 3, 1865. This is wholly unsupported by the facts in the Record. It is conceded that Tayloe, as tenant in common, had title in fee, and there was no one in adverse occupation. The tax title was acquired in 1864, and the deed from George Gibson Huntt in January, 1865. Clearly, where there was no adverse occupation, this is ample evidence of possession by Tayloe, at the date of the act.

But we submit that counsel are in error in assuming the act to refer to actual possession at the time of the passage of the act. This act was not passed for that day, but for all time, and if the words were to be limited to that time it would deprive the statute of almost all utility. The language is "in *favor* of parties in actual possession claiming under and through such deeds." This manifestly applies to possession at the time the deed is relied upon as a defense. It was the purpose of the act to "*quiet*" titles, and, therefore, it provided that persons in possession, claiming under such deeds, might *defend* by them; it was not its purpose to *disquiet* titles by permitting persons out of possession to *recover* by them.

The restricted construction insisted upon by complainants would deprive grantees now in possession of one who was in possession at the time of the passage of the act of all benefit of its provisions, a result too unreasonable to admit of consideration.

4. The Effect of the War upon the Power of Attorney and its Execution.

Mr. Justice Hagner, in the Equity Court, and Mr. Chief Justice Alvey, speaking for the Court of Appeals, each arrives at the conclusion that the war had no effect on the power of attorney in this cause, either to revoke or suspend

it. While there is some difference of method in reaching this conclusion in the two opinions, the views of both learned judges tend to enlighten the interesting subject and the court is respectfully referred to pages 62–65 of the Record, where Mr. Justice Hagner considers this point, and to pages 81–84, where the same subject is treated by Mr. Chief Justice Alvey.

It is broadly contended by appellants that the power of attorney in this case was revoked by the war. It is submitted that for this assertion there is no authority in any principle of public law, nor in any decided case, nor yet in any provision of the municipal laws of the United States.

It must be remembered that the paper in question was executed before the war—in 1859—by a sister and her husband to her only brother, with reference to the sister's share in lands held in common with her brother and sister, and with Ogle Tayloe, through whom appellees claim. The authority to sell and convey her undivided share of these lands was confided by Mrs. Ransom to her brother in contemplation of absence. It covered a considerable number of lots besides the property here in question.

It is quite clear that the land in the District of Columbia might have been partitioned by the court here during the war at the suit of either Tayloe or any of the other tenants in common, and that nobody could have claimed to interfere with the share of Mrs. Ransom except the United States, because of the fact that she and her husband were within the Confederate lines and her husband was an officer of the Confederate Army.

"The existence of war," says Mr. Justice Field, in Masterson *vs.* Howard, 18 Wall., p. 105—

> "does indeed close the courts of each belligerent to the citizens of the other, but it does not prevent the citizens of one belligerent from taking proceedings for the protection of their own property in their own courts against the citizens of the other, whenever the latter can be reached by process."

This court has held partition to be a matter of right in this District. Willard *vs.* Willard, 145 U. S., p. 120. Jurisdiction of the Ransoms could have been obtained in a partition suit by publication (Staffan *vs.* Zeust, 25 Wash. Law Rep. 188); and, moreover, they might have appeared in a suit by counsel. In MacVeigh *vs.* United States, 11 Wall., p. 267, this court says:

> "Whatever may be the extent of the disability of an alien enemy to sue in the courts of the hostile country, it is clear that he is liable to be sued, and this carries with it the right to use all the means and appliances of defense."

Speaking of that case Mr. Justice Miller says, in University *vs.* Finch, 18 Wall., p. 111:

> "If such be the rule in regard to alien enemies in a war between independent States, it should be quite as applicable, if not more so, between citizens of the same government who are only enemies in a qualified sense in a civil war."

In the case of Kershaw *vs.* Kelsey, 100 Mass., p. 561, Mr. Justice Gray, then (1868) an associate justice of the Supreme Court of Massachusetts, entered upon a complete and philosophical examination of the true principles of the law of nations and the decided cases as to the effect of war upon intercourse and contracts. The opinion is referred to in a note to the opinion of this court in the case of Conrad *vs.* Waples (1877), 96 U. S. 290, as—

> "the able and exhaustive opinion of the Supreme Court of Massachusetts . . . delivered by Mr. Chief Justice Gray,"—

and it will be found that there is no decision of this court, before or since Mr. Justice Gray's opinion in Kershaw *vs.* Kelsey, which is at variance with the principles he so clearly announces and so pointedly supports by reason and authority.

"This case," says Mr. Justice Gray (p. 562)—

> "presents a very interesting question requiring for its decision a consideration of fundamental principles of international law. It is universally admitted that the law of nations prohibits all commercial intercourse between belligerents without a license from the sovereign. Some dicta of eminent judges and learned commentators would extend this prohibition to all contracts whatever. In a matter of such grave importance the safest way of arriving at a right result will be to examine with care the principal adjudications upon the subject most of which were cited in the argument."

The learned justice then reviews the cases both in England and in this country, and announces the following conclusion (p. 572):

> "The result is, that the law of nations, as judicially declared, prohibits all intercourse between citizens of the two belligerents which is inconsistent with the state of war between their countries; and that this includes any act of voluntary submission to the enemy, or receiving his protection; as well any act or contract which tends to increase his resources; and every kind of trading or commercial dealing or intercourse, whether by transmission of money or goods, or orders for the delivery of either, between the two countries, directly or indirectly, or through the intervention of third persons or partnerships, or by contracts in any form looking to or involving such transmission, or by insurances upon trade with or by the enemy. Beyond the principle of these cases the prohibition has not been carried by judicial decision. The more sweeping statements in the text books are taken from the dicta which we have already examined, and in none of them is any other example given than those just mentioned. At this age of the world, when all the tendencies of the law of nations are to exempt individuals and private contracts from injury or restraint in consequence of war between their governments, we are not disposed

to declare such contracts unlawful as have not been heretofore adjudged to be inconsistent with a state of war.

"The trading or transmission of property or money which is prohibited by international law is from or to one of the countries at war. An alien enemy residing in this country may contract and sue like a citizen. 2 Kent. Com. 63. When a creditor, although a subject of the enemy, remains in the country of the debtor, or has a known agent there authorized to receive the amount of the debt, throughout the war, payment there to such creditor or his agent can in no respect be construed into a violation of the duties imposed by a state of war upon the debtor; it is not made to an enemy, in contemplation of international or municipal law; and it is no objection that the agent may possibly remit the money to his principal in the enemy's country; if he should do so, the offense would be imputable to him and not to the person paying him the money. Conn *vs.* Penn, Pet. C. C. 496. Denniston *vs.* Imbrie, 3 Wash. C. C. 396. Ward *vs.* Smith, 7 Wallace 447. Buchanan *vs.* Curry, 19 Johns. 137."

The learned Justice makes it quite clear that what the law of nations prohibits is not all intercourse or communication in time of war, or even all commercial intercourse or trade, because the belligerent sovereign may and does issue licenses to trade with the enemy. Undoubtedly the very nature of war prohibits all intercourse or communications between the citizens of the belligerents which tends to aid the enemy. This is, in the language of Mr. Justice Gray, "intercourse which is inconsistent with a state of war between their countries." But the primary object and general rule both concern an unlicensed commercial intercourse or trade with the enemy. War itself by its laws and customs requires certain intercourse and communication with the enemy in the exchange of prisoners of war, in communications by flag of truce, and even, in modern times, in arrangements for the care of the wounded and the burial of the dead. In former

times a ransom bond given to an enemy as the price of liberty made a lawful contract and debt which could be sued on after the war.

Though the controversy in Kershaw *vs.* Kelsey was in regard to chattels and chattel interests in land—certain corn and cotton and a lease of a plantation in Mississippi—the questions arose with reference to land, and the general principles applicable to land and interests therein are thus considered (p. 574):

> "Public international law, being the rule which governs the intercourse of one nation and its subjects with other nations and their subjects, is ordinarily limited, so far as rights of property and contracts are concerned, to movable, or, in the phrase of the common law, personal property, which is in its nature capable of being carried or transmitted from one country to the other; and does not usually touch private interests in immovable property or real estate; although any government may doubtless, by express law or edict, appropriate or confiscate for its own benefit the use, the profits, or even the title, of land within its own territory or occupation, belonging to subjects of the enemy. 3 Phillimore's International Law, 135, 731. Reed *vs.* Reed, 1 Munf. 619. Smith *vs.* Maryland, 6 Cranch, 286. Fairfax *vs.* Hunter, 7 Cranch, 622, 623, 631. Union Insurance Co. *vs.* United States, 6 Wallace, 759. The title of aliens in real estate is usually left to be regulated by the municipal law, and, under our system of government, by the laws of the several States, except so far as controlled by treaties with foreign powers" . . . (p. 575).
>
> "In regard to real estate, there is no difference between an alien friend and an alien enemy, except that the latter cannot maintain an action to recover it while the war lasts, and that it may be confiscated by an extraordinary act of the Government."

The learned justice then reviews the great case of Hunter *vs.* Fairfax, 7 Cr. 619, 620, and quotes the language of Mr. Justice Story, speaking for the majority of this court:

> "We do not find that, in respect to these general

> rights and disabilities, there is any admitted difference between alien friends and alien enemies. During the war, the property of alien enemies is subject to confiscation *jure belli*, and their civil capacity to sue is suspended. But as to capacity to purchase no case has been cited in which it has been denied."
>
> "Indeed, the common law in these particulars seems to coincide with the *jus gentium*."

And he further calls attention to the fact that the doctrine that an alien enemy might acquire title in lands by purchase during the war was again distinctly recognized and affirmed by this court in the case of Craig *vs.* Radford, 3 Wheat. 594.

There was nothing in the municipal law of the United States which forbid the transaction shown in this case.

The Act of Congress of 1861, Chapter 3, Section 5, and the proclamations issued by the President under that act, were expressly limited to forbidding all *commercial* intercourse between the States in insurrection and the citizens thereof and the citizens of the rest of the United States.

Speaking of the Act of 1861 and the President's proclamation, Mr. Justice Gray says, in Kershaw *vs.* Kelsey; *supra* (p. 576).

> "The act of congress and the proclamations of the President upon which the defendant relies in this case are in terms limited to the prohibition of commercial intercourse and the conveyance or transmission of goods and merchandise between the territories occupied by the two belligerents; and thus clearly manifests the intention of the government, in accordance with what we have seen to be the general law of nations, that commercial intercourse, and commercial intercourse only, should be prohibited."

And this court has announced the same conclusion:

> "It was commercial intercourse and correspondence between citizens of one belligerent and those of

> the other, the engaging in traffic between them, which were forbidden by the laws of war and by the President's proclamation of non-intercourse."
>
> Conrad *vs.* Waples, 96 U. S., page 287.

In the appellants' brief (p. 38) it is stated that by the Act of July 17, 1862, and the proclamation of the President, issued in pursuance of it—

> "all sales, transfers or conveyances of the estate and property of persons in rebellion after September 23, 1862, were made null and void."

But this court has decided, in the case of Conrad and Waples, 96 U. S. (p. 387–8), that—

> "the invalidity there declared was limited and not absolute. It was only as against the United States that the transfers of property liable to seizure were null and void. They were not void as between private parties or against any other party than the United States. This was so held in the case of Corbett *vs.* Nutt, reported in the 10th Wallace. There a devise (which for the purpose of the case was treated as included within the terms 'sales, transfers, and conveyances') of property situated in the District of Columbia, made by a resident enemy in the State of Virginia to a person as trustee, who also resided in that State, and held office under the Confederate Government, was held to pass a title good against all the world except the United States."

The case of Conrad *vs.* Waples involved the validity and effect of conveyances made in the Southern Confederacy by the elder to the younger Conrads, all within the Confederacy, of lands within the federal lines. This court upheld the transaction and reasons thus (p. 287).

> "If, then, intercourse between the Conrads, father and sons, they being all enemies, was not unlawful; if between them contracts for the purchase and sale of property, in respect to which there was no special interdict, would have been binding—the

sale in the case at bar can only be impeached, if at all by reason of the situation of the property within the Federal lines. And from that circumstance it could not be impeached, unless the sale, if upheld, in some way frustrated the enforcement of the right of seizure and confiscation possessed by the United States. It may be admitted that the right of a belligerent to confiscate the property of enemies found within its territory cannot be impaired by a sale of the property during the war, but it is not perceived that on any other ground the sale could be invalidated. A conveyance in such case would pass the title subject to be defeated, if the government should afterwards proceed for its condemnation. And to declare this liability was the object of the provision in the Confiscation Act, enacting that 'all sales, transfers, and conveyances' of property of certain designated parties made subject to seizure should be null and void. The invalidity there declared was limited and not absolute."

The learned justice continues, page 290:

"If an alien enemy can, by devise or purchase from a loyal citizen or subject, take an estate in the country of the other belligerent and hold it until office found, there would seem to be no solid reason for refusing a like efficacy to a conveyance from one enemy to another of lands similarly situated. A different doctrine would unsettle a multitude of titles passed during the war between residents of the insurrectionary territory temporarily absent therefrom whilst it was dominated by the Federal forces. Such residents were deemed enemies by the mere fact of being inhabitants of that territory, without reference to any hostile disposition manifested or hostile acts committed by them. In numerous instances, also, transfers of property were made in loyal States bordering on the the line of actual hostilities, by parties who had left those States and joined the insurgents. This was particularly the case in Missouri and Kentucky. No principle of public policy would be advanced, or principle

> of public law sustained, by holding such transfers absolutely void, instead of being merely inoperative as against the right of the United States to appropriate the property *jure belli*; on the contrary, such a holding would create unnecessary hardship, and therefore add a new cruelty to the war."

Some light is shed upon this subject by the decisions of this court in cases growing out of tax sales during the war.

In the case of United States *vs.* Lee, 106 U. S. 196, the owner of the life estate, Mrs. Lee, the wife of Gen. Robert E. Lee, was within the Confederate lines with her husband, and the owner of the reversion, Gen. Custis Lee, was in arms against the United States as a general officer of the Confederate Army; and yet the court clearly intimated (page 204) that the tender by Mr. Fendall of the amount of taxes was a good and lawful tender on behalf of Mrs. Lee.

In the case of Bennet *vs.* Hunter, 9 Wall. 337, young Hunter, in whose favor the tax sale was set aside, was an officer in the Confederate Army. The opinion in that case was delivered by Mr. Chief Justice Chase, and after holding untenable the contention that the payment of taxes could only be made by the owner in person, he continues (page 337):

> "But to whom did the right to make this payment belong? The obvious answer is, to the owner, either acting in person or through some friend or agent, compensated or uncompensated."

This doctrine is affirmed in Tacey *vs.* Irwin, 18 Wall. 549. In the case of Atwood *vs.* Weems, 99 U. S. 183, the same doctrine is affirmed, and the court in its opinion adverts to the fact that in refusing one offer to pay the tax, the clerk said to the party tendering the money to redeem the land in behalf of Weems, who was in the Confederacy, that "*he would take the money from no one but the owner, and he might as well talk of paying tax for Jeff Davis,*" and yet this court held the tender good and the land redeemed.

Where, in time of war, an executory contract made before the war between residents of the belligerent States may be completely executed without commercial intercourse—where an obligation contracted before the war between those who have become enemies, can be honestly discharged without such intercourse—where an obligation is by circumstances imposed upon a resident in the territory of the other—or such an obligation is voluntarily assumed—and no commercial intercourse is necessary to complete it, in all three of these cases, by the principles of modern public law, and by the policy of municipal laws in modern times, such acts are lawful and valid; the contract would be well executed in the first case-the obligation would be validly and justly discharged in the second; and validly and justly assumed in the third.

In the case of ordinary debts, which are subsisting contracts, rights, and obligations, where they cannot be paid without intercourse, war suspends but does not extinguish them. In the supposed cases the war may delay some consequence or sequel requiring commercial intercourse, but it does not invalidate the act accomplished without unlawful intercourse, and does not prevent, on the return of peace, the ratification or acceptance of what may have been thus lawfully accomplished.

No authoritative decision holds a power of attorney such as the one in this case to be revoked by the war. And no case can be found where such a power acted on by both parties has been held illegal or void.

If it is to be treated as an agency created before the war, there was nothing unlawful in its continuance, and all the circumstances surrounding the creation of the agency, the good faith of its continuance and the final execution of the power without a single illegal incident done or attempted, make it a transaction which is binding as well as lawful. But if anything were needed to complete its binding effect

we have the plain and prompt ratification of it after the war when commercial intercourse was no longer suspended, and when the agent accounted to the principal, and the principal accepted the avails of the acts done in her name and otherwise ratified them by her conduct then and ever after.

This case bears no analogy to those decided cases in regard to agencies where the circumstances of the relation of principal and agent, and the conduct of both principal and agent clearly negatived any possible inference of the lawful continuance of the agency. In none of those cases was it possible to infer an intent on the part of principal and agent to lawfully continue and act upon a relation lawfully created and to ratify and confirm acts lawfully done in pursuance of it.

The result of the best considered cases may be safely stated thus: Everything in aid of the enemy and all unlicensed commercial intercourse and trade between belligerents is forbidden and unlawful, and this, by the mere fact of war, without any declaration by the laws of either belligerent. Pre-existing debts which cannot be collected or discharged without commercial intercourse are not extinguished, but only suspended, and pre-existing executory contracts, debts, or obligations, which require no commercial intercourse for their execution or discharge, may be validly and lawfully executed and discharged, notwithstanding the existence of war.

> "I can collect but two principles from the cases cited by the counsel for the defendant, and they are principles on which there never was the slightest doubt. First, that a contract made with an alien enemy in time of war, and that of such a nature that it endangers the security, or is against the policy of this country, is void. Such are policies of insurance to protect an enemy's trade. Another principle is, that however valid a contract originally may be, if the party become an alien enemy he cannot sue. The crown during the war, may lay hands on the

debt and recover it, but if it do not, then, on the return of peace the rights of the contracting alien are restored, and he may himself sue. No other principle is to be deduced."

Chief Justice Gibbs in Antoine *vs.* Marshead, 6 Taunt. 237–9 (cited in Kershaw *vs.* Kelsey *supra*).

"The war suspended the remedy by suit on the contract; *but it is not unlawful,* voluntarily to pay debts, or perform contracts, to alien enemies, if the payment be made or the duty be performed in our country."

Buchanan *vs.* Curry, 19 Johns. 137–141.

"If the contract can be carried into execution, notwithstanding the war, without conflicting with the obligation of allegiance to either party, it will neither be dissolved nor suspended."

Manhattan Ins. Co. *vs.* Warwick, 20 Grattan, 630.

"It does not follow that the agent, if he receives the money, will violate the law by remitting it to his alien principal."

. . . . . .

"Nor can the rule apply when one of several joint debtors resides within the same county with the creditor, or with the known agent of the creditor."

Ward *vs.* Smith, 7 Wall. 452, 453.

The character of agencies which have been held to be revoked by the war are all commercial agencies requiring commercial intercourse. Certainly the agent of an insurance company is peculiarly such an agent, and the collection of premiums of insurance by an agent for a company bears no analogy to the collection of an ordinary debt by an agent for his principal. The very essence of the insurance business is the massing of all the premiums in the hands of the company that they may be invested and used in the fiscal

operations of the company by which alone it offsets its risks and losses.

This court, in the case of Insurance Co. *vs.* Davis, 95 U. S. 425, cited by appellants' counsel, announce a principle which counsel for appellants seems to have overlooked.

The court first qualifies the proposition that war will revoke an agency, because of the inability of the principal and agent to communicate with each other, by the statement "*unless continued by the mutual assent of the parties*," and then proceeds:

> "If the agent continues to act as such, and his so acting is *subsequently ratified* by the principal, or *if the principal's assent is evinced by any other circumstances*, then third parties may safely pay money, for the use of the principal, into the agent's hands," (pp. 429, 430);

and again, (p. 431):

> "Perhaps it may be assumed that an agent *ante bellum* who continues to act as such during the war, in the receipt of money or property on behalf of his principal, where it is to the manifest interest of the latter that he should do so, as in the collection of rents or other debts, *the assent of the principal will be presumed*, unless the contrary be shown; but that, where it is *against his interest*, or would impose upon him some new obligation or burden, his assent will *not be presumed*, but must be proved, *either by his subsequent ratification or in some other manner*. . . . *In some way*, however, it must appear that the alleged agent *assumed to act* as such, and that the alleged principal *consented to his so acting*."

It is quite obvious, therefore, that the *fact* of war does not revoke an agency as *matter of law*, but that whether it operates as a revocation or not, depends upon all the circumstances.

And how stands the case here? While communication was not permitted during the war, it appears that in this

case it was going on constantly (Rec., p. 36), yet no attempt to revoke was ever made, and certainly the act of the agent was ratified and confirmed in the most unequivocal manner immediately after the war by the acceptance of the purchase money.

Much slighter evidence than is contained in this record has been held by this court to establish a ratification.

Lyon *vs.* Pollock, 99 U. S. 673.

Moreover, it is nowhere alleged that Mrs. Ransom and her husband did not know all that was being done and assent thereto; nor is any circumstance alleged tending to show that they ever in any way objected to what had been done, although there was every motive for them to object during Mrs. Ransom's lifetime, had she considered there was any just reason for so doing. It cannot be replied that she was restrained by her husband from attacking the validity of this transaction, because it appears that he instituted a suit to recover the property after her death. Indeed, the irresistible conclusion is that he would have brought suit in her *lifetime* had it not been for the fact that, either her co-operation could not be procured, or her testimony would have been fatal to his claim.

The act of March 3, 1865, to quiet titles in this District was passed *flagrante bello*, but made no exception excluding such powers of attorney; and this attitude of Congress, as to titles in this District, clearly indicates its purpose to leave no possibility of exception by reason of the war.

And, in this connection, it must be remembered that in any case where the special circumstances should make it proper, the courts were open to any one to show these circumstances and ask relief; but with this act before him, and its consequences plain, no one could lie supine, and leave a heritage of litigation to his posterity. The statute was a statute of repose, designed to quiet titles and prevent litigation—it contained no exception—and was meant to

validate the execution of plainly declared intentions, in accordance with the acts of the parties, and in a manner which could not injuriously affect the honestly acquired rights of any third parties.

There was no principle of public law which of itself revoked this power of attorney.

There was nothing in the municipal laws of the United States which tended to weaken its authority, or to prevent its execution except as against the United States.

5. Effect of the Receipt of Purchase Money.

It is further insisted that the decree should be reversed because the receipt of purchase money does not estop a married woman, and under this head a number of authorities are cited holding that the legal estate of a married woman cannot pass by estoppel against the provisions of the statutes regulating conveyancing by her.

It is not necessary to invoke the doctrine of conveyance by estoppel in this case.

The complainants, standing in the place of their mother, have come into equity asking relief. In such a situation a married woman and those claiming through her are as much bound by the principles and practice of equity as other persons. They must alike show that they have an equity for relief, and they also must do equity if they seek equity.

The claim here is founded wholly upon a supposed legal infirmity in a conveyance, and the maker of that instrument asks relief from it upon no equitable grounds whatever. It is in just such cases that this court has denied relief.

In Chilton *vs.* Braiden's Admx., 2 Black, 460, 461, the court say:

> "When one person has got the estate of another, he ought not, in conscience, be allowed to keep it without paying the consideration;"

and further,

> "neither the answer of the party, nor the argument of counsel, allege any good reason why a *married woman should be permitted to take property without paying for it more than another. The disabilities thrown around her are for her protection, not to enable her to commit a fraud.*"

And again, this court in the case of Bank *vs.* Partee, 99 U. S. 325, 329, say:

> "*Their approval of or at least acquiesence in the conduct of their agents estops them in equity* from enforcing the provision as to the acceptance in writing, so as to debar from the benefits of the deed any creditors who accepted the settlement by surrendering the old notes and taking the new ones. *A married woman cannot be permitted any more than an unmarried one, to retain the benefits of a transaction which she has solicited, and at the same time to disavow it.*"

In Bein *vs.* Heath, 6 How. 228, 247, the court say:

> "For if it were admitted that to make the loan binding on the wife it must be proved to have enured to her use, yet if, through the fraudulent intervention of her husband, she negotiated the loan, *giving to it her special sanction, equity would not relieve her.* A doctrine contrary to this would enable the wife to practice the grossest frauds with impunity. . . . Under such circumstances, we think the complainant cannot invoke the aid of a court of chancery. She has acted against conscience in procuring the funds of the mortgagee. *The law protects her, but it gives her no license to commit a fraud against the rights of an innocent party.*"

See also—

Bedford *vs.* Burton, 106 U. S. 338.
Gridley *vs.* Wyant, 23 How. 500.
Gridley *vs.* Westbrooke, 23 How. 503.

Unless, therefore, a married woman shows an equity to

relief she cannot obtain the aid of chancery, nor can she obtain its aid to do that which is against conscience.

6. The Equities of the Case.

Finally the appellants contend that the equities of the case are with complainants.

This is founded, in part, upon an erroneous view of the facts, and in part upon strange and novel ideas of equity.

The deed to Tayloe by the attorney-in-fact was acknowledged January 4, 1865 (Rec., p. 23). On January 7, 1865, Judge Cox sent Mrs. Ransom's share to her sister, Mrs. Gibson (Rec., p. 52). Mrs. Gibson swears that she either turned this money over to Mrs. Ransom, or expended it for her by her direction (Rec., pp. 36, 37). That she met her sister immediately after the war in Richmond in 1865 (Rec., p. 37).

It is inconceivable, if Mrs. Gibson's and Judge Cox's testimony be true (and no attempt is made to deny or contradict it) that Mr. and Mrs. Ransom did not know that Mrs. Ransom's brother George had sold the property, and that the money which Mrs. Ransom received was from that source, for it nowhere appears that she could have expected it from any other source.

Moreover, that she knew she had once claimed an interest in the property cannot be denied, as it is specifically described in the paper executed by her. Yet when she came to Washington after the war, so far impoverished as to be seeking Government employment (Rec., p. 48), she made no inquiry about the property, and though she lived till 1881, sixteen years after the deed was made and twenty-two years after the power of attorney was given, she never questioned the validity of the transaction, nor did her husband while she was alive to speak.

The price obtained was full and fair (Rec., p. 46), and her brother and sister parted with their interest at the same price. The sale was made at the instance of the Ransoms, in

good faith, and for their benefit (Rec., p. 39), and Tayloe paid the money and the Ransoms got it (Rec., p. 46).

On the faith of this transaction Tayloe paid his money and Mrs. Paine, his daughter, acquired the property for full value by the partition deed (Rec., p. 69), and after bearing the burden of taxation when the land was unremunerative, and after having handsomely and expensively improved it, the defendants claiming and holding under Tayloe and his daughter are asked to surrender it to complainants, who can show no better equity than an accidental omission of their mother to confirm her act by an unassailable deed. They are in precisely the same situation as was Mrs. Randall in Randall *vs.* Krieger, *supra*, whose pretended equity is so severely condemned by this court in that case.

It is to the credit of Mrs. Ransom that she never did any act looking to an attempted repudiation of the authorized sale of her property. She having the avails thereof, the eminently high character of herself and sister and brother and all concerned in the transaction, as shown by the testimony in the record, fully explains why she never attempted to impeach it in any way.

Indeed, it would be difficult to imagine a case more utterly devoid of equity than the one made by complainants here. There is no testimony, there is not even an averment, relating to any equitable right. The whole case is based upon a theory which, if correct, would have enabled the complainants to recover at law in the abandoned actions of ejectment, namely, that the power of attorney and deed made in pursuance of it are *void in law*. There is not a suggestion, that if valid in law there is or could be any equitable relief against these title papers.

On the last page of the brief for appellants the following proposition is stated:

"*The bill should in no event have been dismissed absolutely, but should have been without prejudice.*"

It is not perceived on what principle of equity jurispru-

dence or practice the court could uphold the dismissal of a bill like the present without prejudice, where the record disclosed that the complainants had already abandoned three law suits on the same subject, and had brought their controversy for settlement into a court of conscience.

It is respectfully submitted that the decree of the court below dismissing the bill should be affirmed.

CALDERON CARLISLE,
WILLIAM G. JOHNSON,
Counsel for Appellees.

APPENDIX.

An act to quiet titles in favor of parties in actual possession of land situated in the District of Columbia.

[13 Stat. 531.]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress Assembled, That all deeds heretofore recorded in the land records of the District of Columbia, which have been executed and acknowledged by *femes covert* (their husbands having signed and sealed the same) for conveying any real estate or interest therein, situated in said district; and all acknowledgments of deeds heretofore recorded, as aforesaid, which have been made by *femes covert* (whether they have executed the deed or not) for the purpose of releasing their claims to dower in the lands described therein, situated as aforesaid, in which acknowledgments the form prescribed by law has not been followed; and all deeds heretofore recorded, as aforesaid, which have been executed and acknowledged by an attorney-in-fact, duly appointed for conveying real estate situated in said district; and all deeds heretofore recorded, as aforesaid, executed and acknowledged, or only acknowledged by such attorney-in-fact, for conveying real estate situated in said district, as to which the acknowledgement was made before officers different from those before whom proof of the power of attorney was made, and as to which the power of attorney was proved before only one justice of the peace; and all deeds heretofore executed and recorded as aforesaid, for the purpose of conveying land situated in said district, acknowledged out of the District of Columbia before a judge of a United States court, or before two aldermen of a city, or the chief magistrate of a city, or before a notary public; and all deeds heretofore executed and recorded, as aforesaid, for the purpose of conveying land situated in said district, acknowledged by an attorney-in-fact, duly appointed, or by an officer of

a corporation duly authorized, who has acknowledged the same to be his act and deed, instead of the act and deed of the grantor or of the corporation; and all deeds heretofore executed and recorded, as aforesaid for the purpose of conveying land situated in said district to which there is not annexed a legal certificate as to the official character of the officer or officers taking the acknowledgment, shall be, and the same are hereby, declared to be of the same effect and validity to pass the fee simple or other estate intended to be conveyed, and bar dower in the real estate therein mentioned in favor of parties in actual possession, claiming under and through such deeds, as if such deeds had been by such *femes covert* executed and acknowledged, or acknowledged in case of a dower right, in the form heretofore prescribed by law; as if such deeds had been executed and acknowledged by the grantor in the deed; as if such power of attorney had been proved before the officer or officers taking the acknowledgment; as if such power of attorney had been proved before two justices of the peace; as if such acknowledgment had been made before any judge of a State court, or before two justices of the peace; as if such attorneys-in-fact or officer of a corporation had acknowledged the deed to be the deed of the grantor or of the corporation; as if such deeds had thereto annexed a certificate in legal form that the officer or officers taking the acknowledgment were really what they purport to be: *Provided*, That the certificate of acknowledgment by a *feme covert* shall show that the acknowledgment was made "apart" or "privily" from her husband, or use some other term importing that her acknowledgment was made out of his presence, and also that she acknowledged or declared that she willingly executed or that she willingly acknowledged the deed, or that the same was her voluntary act, or to that effect: *And provided, also*, That when the power of attorney shall have [been] executed by a *feme covert* the same shall be effectual and sufficient if there shall have been such an acknowledgment of the same

as would be sufficient, under the provisions of this act, to pass her estate and interest therein were she a party executing the deed of conveyance, the record and copy thereof of any deed recorded as aforesaid to be evidence thereof, in the same manner and to have the same effect as if such deed had been originally executed, acknowledged, and recorded according to law.

SEC. 2. *And be it further enacted*, That all exceptions in favor of parties beyond the District of Columbia, which may by existing laws be replied or relied on in any action or proceeding brought in said district, are hereby repealed and abrogated: *Provided*, That this section shall not affect the right of parties in actions now pending, and such as may be brought within three years from the passage of this act.

SEC. 3. *And be it further enacted*, That the acts of Congress approved May thirty-first, eighteen hundred and thirty-two, and April twenty, eighteen hundred and thirty-eight, in reference to the acknowledgment and recording of deeds of land situated in said district, shall be taken and construed as cumulative with the acts of Maryland on the same subject, in force in said district at the passage thereof; and that an acknowledgment made and certified in compliance with any one of said acts, and before any officers authorized by either of said acts to take an acknowledgment (whether in or out of the District of Columbia), shall be good and effectual; and if it shall appear that the grantor "acknowledged said deed," it shall have the same effect as if he or she acknowledged the deed to be his or her act and deed. And any acknowledgment made by a *feme covert* under either of said acts of Congress (which shall be sufficient under the provisions of this act) of any deed executed by her husband, and heretofore recorded in the District of Columbia, shall be good and effectual to bar all claim on her part to dower in the lands described therein, situated in said district, although she shall not have executed the same.

Approved March 3, 1865.